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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

Bri-Ca

J. R. BRINKLEY, Petitioner

vs.

MORRIS FISHBEIN, Respondent

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

WILL A. MORRISS
San Antonio, Texas
Counsel for Petitioner.

MORRISS & MORRISS,
WILL A. MORRISS, Jr.
San Antonio, Texas

PHIL B. FOSTER,
Del Rio, Texas
Of Counsel.

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No._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

J. R. BRINKLEY, Petitioner

vs.

MORRIS FISHBEIN, Respondent

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

To the Honorable the Supreme Court of the United States:

John R. Brinkley presents this his petition for writ of certiorari, respectfully showing:

MATTER INVOLVED

The action is for libel. Petitioner, as plaintiff, filed this action April 23, 1938, against respondent, Morris Fishbein, in the District Court of Val Verde county, Texas, for damages for libel; cause was removed on petition of respondent to, and tried in, the United States District Court for the Western District of Texas, Del Rio Division.

Petitioner is a physician and surgeon, engaged in private practice as a specialist in prostatic trouble; has been practicing medicine since 1915; had practiced at Milford, Kansas, from 1917 to the end of 1932, at which time he moved to Del Rio, Texas, where he maintained his residence, his practice and his private hospital for his patients until the end of the year 1937, when he discontinued his hospital at Del Rio and opened two hospitals at Little Rock, Arkansas, where he has since continued his practice, operating there these private hospitals for his patients, but continuing his residence in Del Rio.

The matter complained of as libelous was written and signed by respondent, and published in February, 1938, HYGEIA, a monthly magazine of the American Medical Association, of which respondent was editor.

The published article was headed "MODERN MEDICAL CHARLATANS: II" (being the second of a series of articles under that title), and the portions on which

petitioner declared (R. 2-7) are (Exh's 1-4, R. pp. 601-7):

"JOHN R. BRINKLEY

In John R. Brinkley, quackery reaches its apotheosis . . . He continues to demonstrate his astuteness in shaking shekels from the pockets of credulous Americans, notwithstanding the efforts of various governmental departments and agencies . . .

"When his radio station was removed he departed for Mexico, obtaining a license from the Mexican government. Now he broadcasts from Station XERA at Villa Acuna, Mexico, just across from Del Rio, Texas. All sorts of efforts have been made to remove him from the air but apparently without success. Right now he is not doing much in the way of goat gland transplanting. He reads the symptoms of patients and then by remote control prescribes the pill that they should use. You send him your dollar, and you get your pill. In addition, of course, he has a hospital in Del Rio where he performs some peculiar operations. The main one is the compound prostate operation for elderly gentlemen in which he merely injects a little mercurochrome into the tubes passing from the male sex glands. He has a high pressure man in his front office who makes sure that those who come to the hospital will have the money to pay in advance for the work. They are able to develop mortgages, loans and conversion of securities in order to permit the patient to pay on the nail for what he is going to get. Most of the business, however, seems to come by way of the mail, and it is time for the Postoffice

Department to do something in regard to the use of the United States mails by John R. Brinkley in his defrauding of the public . . .

"The evidence assembled indicates that at various times, Brinkley has made as much as $55,000 a week from his various quackeries. He has been the possessor of three fine yachts. He travels abroad and returns to this country in the finest suites on the finest boats, accompanied by his family and the little boy's tutor. On the vessel going and coming neither he nor Mrs. Brinkley engage in conversation with the passengers. His name is too widely known for what he is to make him want to take the chance of what will happen when the passengers learn the names of their trans-Atlantic acquaintance. Yet the money rolls in, which proves that the wages of sin is not always death."

Respondent answered (R. 10-28), in addition to his admissions and denials (pars. 1-5, R. 10-19) admitting publication of the article, alleging (pars. 6-13, R. 19-28) the truth of the statements, and that the publication was qualifiedly privileged as having been published in an organ of the American Medical Association in performance of an alleged duty to the public and to members of said association, in good faith and without malice, and also as fair and reasonable comment on matter of public interest and discussion; and, in mitigation, his prior information concerning the statements, and his belief they were true.

The gist of the evidence for petitioner, in brief summary, aside from formal matters, such as the publication, circulation, etc., and reputation, was that, through long

practice, experience, research and experimentation, petitioner had evolved and uses an expert technique, by way of a simple operation successful in 85 to 95% of cases, avoiding the more severe and dangerous removal operation, for relief of men suffering from enlarged and diseased prostates; that since establishing his hospital in Del Rio, at the beginning of 1933, petitioner had practically devoted his practice to that specialty, during which time he had received around 15,000 patients in his hospitals, and *before coming to Del Rio*, five years before this publication, *he had abandoned and had not since performed any gland transplantation operation;* that on receiving patients at the hospital each is given exhaustive physical and clinical examination with the most modern equipment therefor, before treatment, and only cases appropriate are operated; and that, while he advertises his technique, by radio and by answering correspondence, his practice is legitimate and beneficial, and he does not use the mails to defraud, nor in any manner defraud his patients.

Aside from much documentary proof in the way of advertising matter put out by petitioner while practicing in Kansas, and brief excerpts from his biography, and one or two pamphlets put out since 1933, and aside from a deposition taken in another case in January 1932, of one witness (a convict in Oklahoma penitentiary) to an incident relating to petitioner's practice in Greenville, South Carolina, in 1913, the material testimony for respondent consisted of that of himself and three other experts to the

effect that petitioner's prostate operation is, in their opinion, of no effect.

The cause was tried in March, 1939, before a jury. The trial court, refusing petitioner's requested charges (R. 1126-1132) submitted the case by oral charge (R. 1091-1112), overruling petitioner's exceptions thereto (R. 1113-1119). Verdict (R. 1155) resulted for respondent. The court, overruling petitioner's motion for judgment *non obstante* (R. 1156), gave judgment for respondent (R. 1158). Petitioner appealed to the Circuit Court of Appeals, Fifth Circuit, which court (Brinkley vs. Fishbein, 110 Fed. (2d) 62) affirmed the judgment below, said Court refusing to consider petitioner's assignments of error, or to review the evidence, holding, in effect, that the judgment should be affirmed without regard to errors in rulings on evidence and in charge, because the Court said, under his own admissions (recited in the opinion) petitioner was not entitled to jury issue; and that court, without additional opinion, overruled the petition for rehearing timely filed (R. 1193), wherein petitioner specified the erroneous findings and conclusions of the Circuit Court of Appeals.

The complaint here against, the grave error in, the opinion lies in the fact that it summarily invades the clear province of the jury in holding that petitioner's testimony shows the truth of the statements of fact complained of, and that no evidence shows that petitioner suffered actual

damage; whereas petitioner's testimony does not admit the truth of the accusations, and did show damage, and those were jury issues, to be resolved under appropriate instructions, and on competent evidence, while the trial court had erroneously excluded from the jury competent and material evidence offered for petitioner, and had submitted to the jury materially erroneous charges. The Circuit Court of Appeals had no right to thus determine controverted fact issues, but should have considered the assignments, and reversed and remanded the cause for the errors, in rejection of evidence, and in charge, so that petitioner should receive his right of jury trial on appropriate rulings.

The opinion, too, holds directly contrary to the settled Texas decisions construing the pertinent Texas libel statute, in holding the charges complained of as libelous to be privileged, that is, that they, although including *accusations* and *fact statements*, (charging arch quackery, fraud, corruption, and guilt of the crime of using the United States mails to defraud, and of swindling) are reasonable and fair comment, whereas such statements are never privileged as "reasonable and fair comment", under the Texas decisions construing the Texas libel law,—nor, indeed, under the Federal rule. The Texas decisions cited in the opinion as supporting the opinion do not do so, but settled construction is to the contrary. Warrant for these just complaints will be manifest under appropriate head hereinafter.

BASIS OF JURISDICTION TO REVIEW

Jurisdiction in trial court was based on diversity of citizenship, petitioner being a citizen of Val Verde county, Texas, respondent of Cook county, Illinois; the damages sought, actual and exemplary, being for $250,000.00

The Circuit Court of Appeals rendered its decision affirming the judgment below on March 1, 1940 (R. 1165); petition for rehearing filed March 22, 1940 (R. 1170); considered and overruled, without additional opinion, April 19, 1940 (R. 1193); this petition for certiorari is filed within three months from date of overruling petition for rehearing.

The jurisdiction of this Court is invoked under Judicial Code 240, as amended by Act of February 13, 1925, 43 Stats. 938, USCA title 28, sec. 347 (a). The jurisdiction of the Circuit Court of Appeals is not made final, but this Court is "competent . . . to require by certiorari . . . that the cause be certified."

QUESTIONS PRESENTED

These are:

1: Whether, under the Texas Libel Statute (arts. 5431 and 5432, Rev. Civ. Stats. of Texas, as amended 1927 by Acts 40th Leg. of Texas, reg. sess. p. 121, ch. 80—*see appendix, infra*), published accusation and defamatory fact statement against a professional man (a practicing physician) that he is practicing arch quackery, is corrupt and practicing fraud in defrauding his patients and the public by taking money for an inefficacious technique, and is guilty of the crime of using the United States mails to defraud, and his practice a sin, are privileged as reasonable and fair comment and opinion, regardless of their truth. The Circuit Court of Appeals so held.

2: Whether, under the Texas Libel Statute aforesaid, the acts and practices of petitioner, merely a private medical

practitioner, in conducting his practice as such, are matter of public concern. The Circuit Court of Appeals so held.

3: Whether, under authority of Federal Rule of Civil Procedure 26, (d) (4), deposition taken in 1932, in a different suit, in another State, not involving the same transaction, nor subject matter, but wherein petitioner sued respondent and another, for libel published in 1930, dissimilar in sundry respects to the libel here charged, and which suit was dismissed in 1934 (by which deposition evidence from a witness to prejudicial acts of petitioner occurring in 1913, denied by petitioner, was received in evidence for respondent for this suit—and without proof that the deposition was used in evidence in the former suit, or of the non-availability of the witness to testify in this suit) was competent evidence against petitioner on trial herein.

4: Whether, in suit by a physician for libel in publication charging that such physician was practicing but arch quackery and fraud, and using the United States mails to defraud in taking money from credulous patients without benefit to them for an inefficacious prostate gland operation, it was competent, after defendant had, on trial, adduced evidence from experts that in their opinion the operation was of no efficacy, for plaintiff to adduce proof, in rebuttal, from his patients shown to have received the operation, of their symptoms (shown to be symptoms of prostatic sufferers) prior to the operation, and their freedom from such symptoms and suffering since, as tending to disprove the charges of inefficacy and fraud. The proof, from sixteen such witnesses, was offered, (by way of fact statements, and not as opinion) but the trial court excluded it, and the Circuit Court of Appeals affirmed without considering the pertinent assignment.

5: Whether, in suit by a physician for libel in magazine article charging that such physician was practicing but arch quackery and fraud, and using the United States mails to defraud, in taking money from credulous patients, for inefficacious prostate gland operation, the mere fact plaintiff admitted he had nearly twenty-five years previously obtained medical diploma from a school termed a diploma mill, had later experimented with and advertised and practiced goat gland transplantation for rejuvenation, and that some eight years before the publication his radio license, and his license to practice in two states, had been revoked, and that he had been indicted (though never tried) in another state for conspiracy to unlawfully practice medicine, and that at the time of the publication he was an advertising doctor, by pamphlet and over the radio, should have the legal effect to preclude his right of recovery, notwithstanding the testimony in his behalf was that since he established his hospital and began practice in Texas five years before the publication he had not practiced the transplantation operation, but had, after many years practice and research, practiced as a specialty the prostate gland operation, of milder technique and less dangerous than those known as the removal and reaming operations on that gland, and that all his patients received, on entering the hospital, complete detailed physical examinations, and thousands had received the operation and been relieved and benefitted and that this practice was the result of long study, experience and scientific experimentation, and, including his use of the mails, was legitimate, and beneficial to prostate sufferers, and not a fraud, albeit he continued advertising. The Circuit Court of Appeals held that the gist of the published charges was that plaintiff was a charlatan, a quack, and that the fact of his trans-

gression of the standard of ethics of the profession support the charge of quackery as reasonable and honest opinion, and that, without regard to errors assigned against the rulings of the trial court, the judgment should be affirmed for such reason.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals, in construing the Texas libel statute, which statute privileges only "reasonable and fair comment or criticism" held that "the publication (in question) was privileged". Not only do the two Texas cases cited in the opinion to support the conclusions *not* support them, nor relate to the question, but the settled doctrine of the Texas decisions is that fact statements and accusations (of corruption, crime, dishonesty, and the like) are never allowed as comment or criticism, but as to all such statements and accusations the only defense is truth,—privilege does not extend to the making of false statements of fact, even though made in good faith, and with reasonable cause to believe it true; accusations or statements of fact published must be substantially true in all respects, and are not privileged. The Circuit Court of Appeals, therefore, decided an important question of Texas law in direct conflict with applicable Texas decisions, by which decisions it was bound.

A. H. Belo & Co. vs. Looney (Tex. Sup.) 112 Tex. 160; 246 S. W. 777, 783;

Express Pub. Co. vs. Lancaster, (Tex. Com. App.) 2 S. W. (2) 833, 834 (superseding prior opinion in 285 S. W. 810);

Moore vs. Leverett (Tex. Com. App.) 52 S. W. (2) 252, 255;

Jenkins vs. Taylor (Tex. Civ. App.—wr. dism.) 4 S. W. (2) 656, 658;
Ferguson vs. Houston Press (Tex. Civ. App.) 1 S. W. (2) 387, 393; affd. 12 S. W. (2) 125;
Cf. for Federal rule:
35 C. J. 1285, sec. 291;
Post Pub. Co. vs. Hallam, 59 Fed. 530, 539-542;
Washington Times vs. Bonner, 86 Fed. (2) 836, 110 A. L. R. 393.

The publication here in question charged on plainly accuses petitioner, a private medical practitioner, with corruption, cheating and defrauding his patients, and with the crime of using the United States mails to defraud; is defamatory and denunciatory; and this injurious misconstruction of the Texas privilege statute in relation to publication is of vital concern to the liberty of every citizen, and should not be allowed to pass uncorrected.

(2) The Circuit Court of Appeals, in holding that the accusations and purported fact statements in the publication complained of, to-wit, that petitioner, a physician, is practicing arch quackery and defrauding the public and his patients, and is guilty of the crime of using the United States mails to defraud, and his practice sinful, are priviledged as reasonable and honest opinion; has rendered a decision in conflict with the decison of another Circuit Court of Appeals and of this Court on the same matter, and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for the exercise of this Court's power of supervision.

35 C. J. 1285, sec. 291;
Post Pub. Co. vs. Hallam, 59 Fed. 530, 539-542 (Sixth Circuit, Mr. Justice Taft);

Washington Times vs. Bonner, 86 Fed. (2) 836, 110 A. L. R. 393.

3. The Circuit Court of Appeals, in holding that the published statements and accusations in question against petitioner, a purely private citizen, in private life, not a candidate nor public official, "was a matter of public concern", decided an important question of local law in a way in conflict with applicable local decisions and contrary to the intent of the legislative act, injuriously to the rights of every citizen; and such misconstruction should not be allowed to pass uncorrected.

Democrat Pub. Co. vs. Jones (Tex. Sup.) 83 Tex. 302, 307; 18 S. W. 652;
Houston Chronicle Pub. Co. vs. Tiernan (Tex. Civ. App.) 171 S. W. 542;
Times Pub. Co. vs. Ray (Tex. Civ. App.) 1 S. W. (2) 471; affd. 12 S. W. (2) 165;
Jenkins vs. Taylor, supra;
San Antonio Light Pub. Co. vs. Lewy (Tex. Civ. App.—wr. ref.) 113 S. W. 574;
Rood vs. Dutcher (S. D. Sup.) 120 N. W. 772;
Farmers & Mech. Nat'l Bank vs. Hanks (Tex. Sup.) 104 Tex. 320, 137 S. W. 1120;
Cf. 27 Tex. Jur. 668, n. 7; ib 672, sec. 47.

4. Petitioner's specification of error No. 17, in the Circuit Court of Appeals (propositions 8-10, pp. 64-79, Br. for Appellant in that court) complaining of the trial court's admission in evidence of the deposition of respondent's witness James E. Crawford, taken in a different suit, not involving the same transaction, nor subject matter (namely, Cause No. 6949 in the district court of Geary county, Kansas, which suit was filed in 1930, dismissed 1934, through which deposition, taken in 1932, evidence

was received herein from said witness of prejudicial acts of petitioner in Tennessee in 1913, under purported authority of Federal Rule of Civil Procedure 26 (d) (4), presented material error on controverted issue; and the Circuit Court of Appeals should have considered such assignment and reversed for such error in admitting such deposition. Such error, misconstruing Federal Rule 26 (d)

(4) should be reviewed.

Federal Rule of Civil Procedure 26 (d) (4);
Haglage vs. Monark Gasoline Co. (Mo.) 298 S. W. 117, 120;
Grinninger vs. Philpot, 11 Fed. Case No. 5852;
Consolidated Paper Co. vs. Crockett, (Ga.) 181 S. E. 158;
Weston vs. Stammers, (Pa.) 1 L. Ed. 11;
McAndrews vs. Chicago, etc., Railway, 162 Fed. 856, 858, the Seventh Court;
Watson vs. St. Paul City Ry Co. (Minn.) 79 N. W. 308.

5. The Circuit Court of Appeals, in holding that it was "spared the necessity of discussing the assignments of error in detail and of reviewing the evidence"—in refusing to consider petitioner's specifications of error—and in concluding that "the evidence of plaintiff . . . tends to show the truth of the statements of facts complained of, and we find no substantial evidence tending to show defendant was actuated by malice, or that plaintiff suffered any actual damage compensatable in money", ignored substantial evidence, both of malice and money damage, and clearly invaded the province of the jury on the subject of the truth of the charges of corruption and fraud, and the crime of using the United States mails to defraud, and of sinful practice, and of the inefficacy of petitioner's pros-

tate operation, and as well of quackery in his practice at the time of the publication,—the evidence making a case for the tryers of fact; and this state of the record required that the assignments of error be passed on. The conclusion was a clear invasion of the province of the jury, and the unwarranted substitution of the judgment of that court, against the right to jury finding on controverted issues, under correct rulings, on evidence and in charge.

Gunning vs. Cooley, 281 U. S. 90, 74 L. Ed. 720;
Engstrom vs. DeWitt (8th C.) 58 Fed. (2) 137, 138;

6. Petitioner's specifications of error Nos. 1 to 16, inclusive, in the Circuit Court of Appeals (Br. for Appellant in that court pp. 12-25), complaining of the trial court's exclusion of the testimony of witness I. F. Ingram and 15 others offered in rebuttal of the testimony of experts for respondent, in effect that each of those witnesses had undergone petitioner's prostate operation, prior to which they had long suffered all symptoms—admitted to be such—of prostate gland enlargement, and since which they had felt no such symptoms, presented material error on controverted issue; and the Circuit Court of Appeals should have considered such assignments and reversed for such error.

Collins vs. Tansey, 126 Atl. 536 (Ct. of Errors & Appeals, N. J.)
Reeve vs. Dennett, 11 N. E. 938 (Mass.)
Commonwealth vs. Leach, 30 N. E. (Mass.) 163
Chesterfield Mfg. Co. vs. Leota Cotton Mills, 194 Fed. 358 (4th Cir.)
M. K. & T. Ry. Co. vs. Patterson, 164 S. W. 442, (Tex. Civ. App.)
T. & N. O. Ry. Co. vs. Glass, 107 S. W. (2) 924, (Tex. Civ. App.)

Brewer vs. Cochran, 99 S. W. 1033, (Tex. Civ. App.)
Pounds vs. Minter, 13 S. W. (2d) 351 (Tex Com. App.)
Luke vs. United States, 84 Fed. (2) 823 (5th Cir.)
Cox vs. United States. 103 Fed. (2) 133 (7th Cir.)
Prudential Ins. Co. vs. Bialkowski, 85 Fed. (2) 880 (4th Cir.)
Corrigan vs. United States, 82 Fed. (2) 106 (9th Cir.)
United States vs. Monger, 70 Fed. (2) 361 (10th Cir.)
Central Tex. Mutual Life Assn. vs. Parrish, 23 S. W. (2) 780, (Tex. Civ. App.)
General Life Ins. Co. vs. Potter, 124 S. W. (2) 409 (Tex. Civ. App.)
Employers Liability Ins. Corp. vs. Williams, 293 S. W. 210.
Gulf Cas. Co. vs. Fields, 107 S. W. (2) 661; (Tex. Civ. App.)
19 Tex. Jur. 354:
McCormick & Ray on Texas Law of Evidence, p. 819;
McKelvey on Evidence, (2nd Ed.) p. 238.

7. Petitioner's specifications of error Nos. 27-28, in the Circuit Court of Appeals, (Br for Appellant in that court, pp. 30-36, same as assignments Nos. 15 and 16 pp. 11-17, Motion for Rehearing) complaining of the trial court's charge that reasonable and fair comment or criticism is priviledged, whereas the defamatory and denunciatory charges complained of that petitioner is an arch-quack, cheating and defrauding his patients by taking money for a useless technique, and guilty of the crime of using the United States Mails to defraud, and his practice a sin in effect deserving death, and the like, may not in law be considered reasonable and fair comment or criticism, but constitute statements of purported fact and accusation just-

ified only by proof of truth thereof, which the trial court refused to charge, presented material and prejudicial error: and the Circuit Court of Appeals should have considered such assignments and reversed for such error, and its refusal so to do should be reviewed. (See authorities p. 11-12 supra Reason No. 1).

8. Petitioner's specifications of error No. 29, in the Circuit Court of Appeals (Br. for Appellant in that court pp. 37-38, discussed pp. 111-117, same as assignment No. 17 pp. 18-20, Motion for Rehearing.) complaining of the trial court's charge (R-1099-1101) on privilege, that if the matter was one of public concern it was privileged, and refusing to tell the jury that the purported statements of facts and defamatory accusations were not to be considered reasonable and fair comment or criticism, and hence were not privileged, but could only be justified by proof of truth thereof, presented material and prejudicial error: and the Circuit Court of Appeals should have considered such assignments and reversed for such error, and its refusal so to do should be reviewed. (See authorities p. 12-13 supra Reason No. 2).

WHEREFORE, petitioner prays that writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court complete transcript of the record and the proceedings of said Court had in the case numbered and entitled on its docket No. 9230, J. R. Brinkley, Appellant, vs. Morris Fishbein, Appellee, that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by this Court and the cause re-

manded; and for such further relief as to this court may seem proper.

Dated: July 16, 1940.

WILL A. MORRISS
San Antonio, Texas
Counsel for Petitioner.

MORRISS & MORRISS,
WILL A. MORRISS, Jr.
San Antonio, Texas

PHIL B. FOSTER,
Del Rio, Texas
Of Counsel.

BRIEF OF ARGUMENT IN SUPPORT OF PETITION

We have, in the petition, supra, stated the nature and history; cited (p. 6) the volume and page of the opinion; (pp. 7 to 8) stated the basis of this Court's jurisdiction; and, under the reasons for the writ (pp. 11 to 17) taken the liberty to cite the pertinent decisions. Begging, therefore, for brevity, to pretermit repetition, we merely add references to the record, and the Specifications of Error.

STATEMENT OF THE CASE

We adopt what is said in "Matter Involved", supra. The proof raised fact issue:

1. AGAINST QUACKERY, CORRUPTION, FRAUD AND CRIME IN PETITIONER'S PRACTICE: He was 53 years old (R. 479); had studied medicine, his father's profession, since boyhood (R. 480); secured his license in Tennessee in 1915 (R. 484), practiced ever since; took up practice in Kansas in 1917 (R. 484); continued research including periods of special study in clinics in Chicago, New York, and elsewhere, and later in Europe and China (R. 484); early became interested in glandular study (R. 485, 487); was for years Fellow of the American Medical Association (R. 486, 487), and "became convinced there was benefit in glandular transplantation", and made much experimentation, but discontinued that practice in 1933 before coming to Del Rio (R. 489-490), his central thought being to evolve an operation to avoid the removal of prostatic glands in men (R. 490-492); has performed at least three thousand of the present prostate gland operations (R. 494) and a very

high percent (R. 496)—80 to 95% (R. 33-59) effect cures. The beneficial nature of this operation, the scientific examinations, treatments and care of patients, the complete equipment and careful technique used were testified to for petitioner by Doctors Petermeyer (R. 31, 426), Davis (R. 536), Conn (R. 545, 581) and Chandler (R. 553) and petitioner (R. 98, 184, 479). Fact case of the efficacy of his operation, the regularity of his practice in all things save only that he advertised, and refutation of the charge of fraud, corruption and violation of the mail fraud statute was thus made for petitioner. Petitioner testified his Connecticut license was revoked in 1923, while he was in China, a "blanket revocation" of all Eclectic doctors; and the indictment in California after he had been out there in consultation with a doctor, returned and dismissed in his absence (R. 499-500); further that he has not treated persons by mail or radio (R. 501); his operation benefits mankind, and adopted by other doctors (R. 535).

2. MONETARY DAMAGE BY THE PUBLICATION is shown in the admitted fact that the magazine had very large circulation throughout the country, including the Doctor's home town; to have caused him much shame and humiliation (R. 535) and that his income fell off about $200,000.00 in the year following the publication (R. 129).

3. MALICE: The intemperate article itself (R. 601-607) is replete with circumstance of reckless and malicious mood; petitioner had therefore, in 1930, sued respondent for libel, writing in many respects similar (Exh. 51, R. 1014), suit dismissed in 1934 (R. 1086). Respondent, on shipboard from Europe, a month before this article was written, had twice declined, and again after arrival

at the hotel declined, opportunity to speak to petitioner or the latter's wife (R. 267-8) and stopped his daughter from playing with petitioner's son (R. 267-8); first publishing, in January, 1938, Hygeia, an article stating that petitioner, at Milford, Kansas, was a blatant quack "whose professional record reeks with charlatanism of the crudest type", and the following month published the article in question.

4. ERRONEOUS EXCLUSION OF EVIDENCE FROM PATIENTS: After respondent's three expert urinologists from Dallas, Houston and San Antonio, Texas (R. 292, 322, 342) had testified to their opinion the operation of petitioner was of no effect, and after the symptoms of enlarged prostate gland trouble had been shown, and after said experts had admitted that any method for relief of that common trouble to spare necessity of operation, even the milder transurethral, would be a boon to humanity, and that the way to learn the benefit of an operation is to note the results, petitoner, in rebuttal, offered sixteen witnesses, severally shown to have undergone his operation, through period of five years, all offering to testify that before their operations they suffered the admitted symptoms, painful, burning and frequent urination, pain in lower abdomen, back, hips, crotch, arms, legs, and the like; and that since their operations they had not felt such pains, but had done their normal work (R. 395, 415, 417), but the Court excluded all such evidence; these errors urged in assignments 1-16, br.. for appellant, R. 1225, Props. 1-7, pp. 40-43.

5. ERRONEOUS CHARGES: The Court charged (R. 1091-1113) that "if the article be one which is privileged, there is no liability, whether it is true or not . . .

question of malice or lack of malice does not enter into it . . . if reasonable and fair comment or c r i t i s m with regard to matters of public concern,—verdict should be for the defendant, even though you find such matters of comment and critism to be false . . . occasion is privileged one . . . and if comment or critism fair and reasonable, though may exceed the limits of what he can legally prove to be the truth, he is protected from liability . . . matters of public h e a l t h are of public concern". There were many like repetitions in the charge; all excepted to, but all exceptions overruled (R. 1113, 1120).

SPECIFICATIONS OF ERROR

First Specification

The Circuit Court of Appeals erred, in its construction of arts. 5431 and 5432 of the Revised Civil Statutes of the State of Texas of 1925, as amended in 1927 by the Act of the 40th Legislature, regular session, Ch. 80, p. 121, in holding that the publication complained of, wherein it charged petitioner, a physician, a private citizen, with arch quackery, corruption, fraud and the crime of using the United States mails to defraud, was privileged as reasonable and fair comment or criticism or honest opinion. (Based on Specifications Nos. 15, 16, pp. 11-17, 5 and 6, pp. 4-5, in Petition for Rehearing in Circuit Court of Appeals; Nos. 27, 28, pp. 30-36, Br. for Appellant in that Court.)

Second Specification

The Circuit Court of Appeals erred in holding that, under the Texas Libel Statute, the acts of a private practitioner of medicine, not a candidate nor public office holder, in relation to his practice, are matter of public concern. (Based on Specifications Nos. 17, pp. 18-20, 8, p. 6, in Petition for Rehearing in Circuit Court of Appeals; No. 29, p. 36, br. for Appellant in that Court.)

Third Specification

The Circuit Court of Appeals erred in holding that because of the admissions of petitioner, in effect that he first obtained medical degree from an institution later termed a diploma mill, and had been practicing since 1915,

began practice in Milford, Kansas in 1917, there advertised by pamphlet and newspapers and radio an operation for transplanting goat glands for sexual rejuvenation, and had treated 5,000 to 6,000 persons, charging some as high as $750.00 therefor, and had a gross income of about $100,000.00 a month, abandoned the goat gland practice in 1933; that his radio license and his license to practice medicine in Kansas and in Connecticut was revoked about 1930, and he was indicted in California for conspiracy to unlawfully practice medicine, and that at the time of the writing of the article in question he was advertising, by radio from Mexico, and was prescribing by letter to persons who wrote their symptoms, and charged therefor, the charge of quackery at the time of the publication in question, which was the gist of the publication, was thereby made out, and that the jury verdict and judgment thereon should therefore be affirmed without regard to errors of the trial court in admission and rejection of evidence and in charge, and without reviewing the assignments; notwithstanding substantial testimony in the record for petitioner that he had been practicing medicine since 1915, and had had extensive study, research and experience to qualify himself, and that for five years preceding the publication in question he had abandoned and not practiced the goat gland transplantation operation, which had been begun and continued experimentally, though that had been efficacious in many cases, and that for five years preceding the publication complained of he had maintained his hospital and practice for the specialty of prostate operation, for which he had qualified himself, having worked out a milder technique for the relief of extensive suffering in men due to prostate enlargement and disease, and that such technique was successful in about

90% of the cases, and that he gave faithful and beneficial treatment to all patients in his hospital and was not defrauding them, nor certainly during said five years last past practicing quackery nor fraud, but giving benefit and value to his patients, and was not using the United States mails to defraud,—the evidence for petitioner thus raising jury issue which the Circuit Court of Appeals had no right in law to thus decide. (Based on Specifications Nos. 1, 2, 3, 5, 6, 7, pp. 1-6, Nos. 9, 9-a, 10, 11, 12, pp. 6-10, in Petition for Rehearing in Circuit Court of Appeals; Nos. 1-17, pp. 12, 26, Nos. 24, 28, br. for Appellant in that Court.)

Fourth Specification

The Circuit Court of Appeals erred in holding that the gist of the publication complained of as libelous was the charge of quackery, notwithstanding same specifically accused petitioner of swindling and cheating his clients, and fraud on the public and with the crime of using the United States mails to defraud. (Based on Specifications Nos. 1-6, pp. 1-5, in Petition for Rehearing in Court of Circuit Appeals.)

Fifth Specification

The Circuit Court of Appeals erred in holding that petitioner's departure from accepted professional ethics is sufficient to support a reasonable and honest opinion that he should be considered a charlatan and a quack, and that the article in question was therefore privileged. (Based on Specification No. 6, p. 4, Petition for Rehearing.)

Sixth Specification

The Circuit Court of Appeals erred in holding, in effect, that the record discloses no substantial evidence to show respondent was actuated by malice in the publication in question. (Based on Specification No. 4, p. 3, Petition for Rehearing.)

Seventh Specification

The Circuit Court of Appeals erred in holding, in effect, that the record discloses no substantial evidence to show that petitioner suffered "actual damage compensatable in money". (Based on Specification No. 9, pp. 6-7, Petition for Rehearing.)

Eighth Specification

The Circuit Court of Appeals erred in holding it was not required to pass on petitioner's specifications of error, refusing to do so, on account of admissions by petitioner that, contrary to the rule of ethics in the medical profession, he was an advertising doctor, and had years previously advertised and practiced goat gland transplantation, receiving large pay therefor, and had been denied renewal of radio license, and his license to practice medicine in two states had been revoked, and he had been indicted for conspiracy to unlawfully practice in one state; all notwithstanding the evidence for petitioner showed he was practicing, and had for five years practiced, as a specialty, a beneficial technique efficacious to relieve men suffering from prostatic disease, milder and less harmful than the customary operation therefor, worked out after long research and experience; and that his practice was, otherwise

than his advertising, regular, and not a fraud on his patients nor the public, nor in violation of the United States mail fraud statute, thus raising jury issue by substantial evidence which the said Court had no right to override. (Based on Specifications Nos. 1-18, pp. 1-20, Petition for Rehearing in Court of Circuit Appeals.)

REMARKS

That the case was one for jury issue, and which the Appellate Court had no right to decide against petitioner on the facts, appears most clear. Perhaps no more forceful illustration can be made than that wherein the court said it found no evidence of malice, in the face of the most vituperative article itself, the fact respondent had, ten years before, been sued by petitioner, that on shipboard and elsewhere respondent had even refused to speak to petitioner or his wife, and had his own daughter desist from playing with their son, forthwith wrote and published two articles denouncing petitioner, and pleaded the truth of his denunciatory accusations. We think no authority denies that such state of facts raises the issue of malice, even the article itself would do so. Against the finding of no monetary damage in the face of so extreme a publication against a professional man who had so large and widely scattered a patronage, it is shown the publication was read throughout America, shown too, that it caused petitioner much mortification, shame and humiliation, as was natural, and that his gross income fell off following the publication by about $200,000.00 in the year, as was calculated from such a publication. Such conclusions on part of the Circuit Court of Appeals are quite unjustifiable in the evidence.

The rule that Circuit Court of Appeals may not decide controverted fact issue, but that if, considering the evidence most favorably to an appellant, and excluding all contrary evidence, the jury might have found for the appellant if excluded competent evidence for him had been admitted, or if admitted incompetent evidence had been excluded, or if error in charge had not been committed,

it is the duty of the court to reverse, is not materially different in our federal courts from the Texas rule. Where reasonable minds may honestly differ, jury question exists.

Gunning vs. Cooley, 281 U. S. 90, 74 L. Ed. 720;
Engstrom vs. DeWitt (8th C.) 58 Fed. (2) 137, 138.
Cf.
GH&SA vs. American Gro. Co. 122 Tex. 1, 36 S. W. (2) 985, 990;
Williamson vs. Tex. Indemnity Ins. Co. 127 Tex. 71, 90 S. W. (2) 1088, 1089;
Burrage vs. Red Arrow Taxi Co., 123 S. W. (2) 731, 732, syl. 1-4, and authorities collated;
Caller Times Pub. Co. vs. Chandler, 122 S. W. (2) 249, 253, affd. 130 S. W. (2) 853.

In the last cited case (a libel case) the court said:

> "There was material evidence, whether false, fanciful, incongruous or silly, as some of it appears to be, to support the statements, and it was for the jury, and not the court, to appraise that evidence and resolve the issues raised by it."

Concerning the contention that the Court erroneously erred in his charge on "reasonable and fair comment", and "public concern", and that the decision of the Fifth Court is wrong, the settled rule, in both respects, is to the contrary, as will be plainly manifested from the authorities cited pages 11 and 12 the petition, supra. So familiar, we think, is this Court with those rules we shall not here consume space to quote from the decisions, but merely remark that as to reasonable and fair comment, the Federal and Texas decisions are in accord, and accord with the general rule, while the question of "public concern" has not, we think, been decided by this Court, al-

though the Texas cases are, we think, clear, while the South Dakota case of Rood vs. Dutcher, 120 N. W. 772 is definite, on the point.

Then, an examination of our Texas statutes on the subject, in the light of the rule of *ejusdem generis* announced in our Texas Supreme Court's decision in the case of Farmers & Mechanics Nat'l Bank vs. Hanks, 104 Tex. 320, 137 S. W. 1120, will, we think, render very clear that our Texas statute does not embrace the acts of a private practitioner as of "public concern."

Certainly it must be said that the evidence raised plain fact issues which can only be rightly resolved by the jury on correct rulings in the admission and exclusion of evidence, and in charge; and that the Circuit Court of Appeals, in its apparent consideration only of the advertising doctor's departure from the ethical rule, has not only invaded the rightful jury province, but has done violence to all the many noble expressions of our courts of last resort in respect to the right of trial by jury.

It is therefore respectfully submitted that this cause is one calling for the exercise by this Court of its supervisory powers by granting the writ of certiorari and thereafter reviewing and reversing said decision.

WILL A. MORRISS,
Counsel for Petitioner.

MORRISS & MORRISS,
WILL A. MORRISS, Jr.,
San Antonio, Texas,
PHIL B. FOSTER,
Del Rio, Texas,
of Counsel.

APPENDIX

Title 88 of the Revised Civil Statutes of Texas, entitled "Libel," is made up of articles 5430 to 5433, inclusive.

"Article 5430: (5595) Definitions: A libel is a defamation expressed in printing or writing, or by signs and pictures, or drawings tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of any one and thereby expose such person to public hatred, ridicule, or financial injury." (Acts 1901, p. 30).

Articles 5431 and 5432 amended by Acts 40th Legislature, Regular Session, p. 121 Chapter 80 are as follows:

Article 5431. In any action for libel, in determining the extent and source of actual damage and in mitigation of exemplary or punitive damage, the defendant may give in evidence, if specially pleaded, all material facts and circumstances surrounding such claim of damage and the defense thereto, and also all facts and circumstances under which the libelous publication was made, and any public apology, correction or retraction made and published by him of the libel complained of, and may also give in evidence, if specially pleaded in mitigation of exemplary or punitive damage, the intention with which the libelous publication was made. The truth of the statement, or statements, in such publication shall be a defense to such action."

"Article 5432. The publication of the following matters by any newspaper or periodical shall be deemed priviledged and shall not be made the basis of any action for libel:

1. A fair, true and impartial account of the preceedings in a court of justice, unless the court prohibits the publication of same when in the judgment of the court the ends of justice demand that the same should not be published and the court so orders, or any other official proceedings authorized by law in the admisistration of the law.

2. A fair, true and impartial account of all executive and legislative proceedings, including all reports of and proceedings in or before legislative committees and before each and all such committees heretofore appointed by the Legislative or either branch of the Legislature or hereafter to be appointed by such bodies or either of them and of any debate or statement in or before the Legislature or either branch therof or any of its committees, and including also all reports of and proceedings in or before the managing boards of educational and eleemosynary institutions supported from the public revenue, of city councils or other governing bodies of cities or towns, of the commissioners' court of any county, and of the board of trustees of the public school of any district, city or county, and of any debate or statement in or before any such body.

3. A fair, true and impartial account of the proceedings of public meetings, dealing with public purposes, including a fair, true and impartial account of statements and discussion in such meetings, and of other matters of public concern, transpiring and uttered at such public meetings.

4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information.

5. The priviledge provided under Section 1, 2, 3, and 4, of this article shall extend to any first publication of such priviledged matter by any newspaper or periodical, and to subsequent publications thereof by it when published as a matter of public concern for general information; but any re-publication of such priviledged matter, after the same has ceased to be a matter of such public concern, shall not be deemed priviledged, and may be made the basis of an action for libel upon proof that such matter had ceased to be of such public concern and that same was published with actual malice.

"Article 5433 (5598) Construction. Nothing in this title shall be construed to amend or repeal any penal law on the subject of libel, nor to take away any now or at any time heretofore existing defense to a civil action for libel, either at common law or otherwise, but all such defenses are hereby expressly preserved. (Id. Acts 1917, p. 474.)"

AUG 16 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 252

JOHN R. BRINKLEY, PETITIONER,

versus

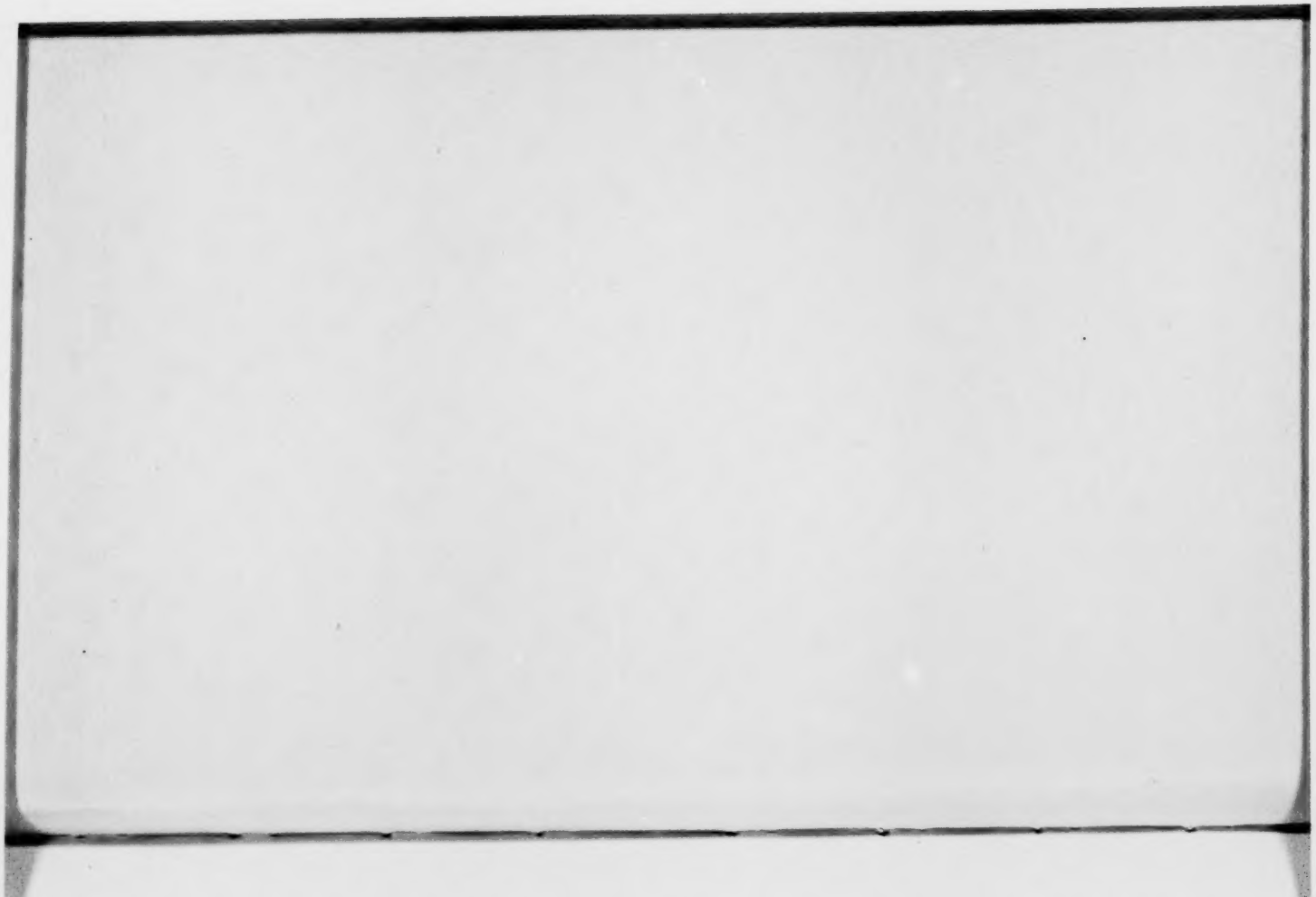
MORRIS FISHBEIN, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

W. L. MATTHEWS,
Counsel for Respondent.

Of Counsel:
LOESCH, SCOFIELD, LOESCH & BURKE,
and CLEMENT L. HARRELL,
10 South LaSalle Street,
Chicago, Illinois.
BROOKS, NAPIER, BROWN & MATTHEWS,
San Antonio, Texas.

LODOVIC PRINTING CO., SAN ANTONIO, TEXAS



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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The opinion in the Circuit Court of Appeals for the Fifth Circuit is reported in 110 F. (2d) 62, and is in the record at page 1165. The case was tried before a jury and no opinion was filed in the trial court.

II.

JURISDICTION.

The petition for writ of certiorari does not contain a statement particularly disclosing the basis upon which it is contended the Court has jurisdiction. It merely refers to the amount sued for and the statute providing for re-

view on writ of certiorari. This does not constitute compliance with Rule 38 and Paragraph 1 of Rule 12 of the Revised Rules of the Supreme Court.

The courts below had jurisdiction only by virtue of diversity of citizenship, and no constitutional question or question arising under federal law is involved. The petitioner seeks a review of matters arising on questions of fact determined against the petitioner by jury verdict in an action for libel governed by Texas law. The jury, by its general verdict, found the alleged libelous statements made the basis of the suit (a) were true, and (b) were fair comment and criticism and hence privileged.

The writ should be denied under the authority of *United States* vs. *Rimer*, 220 U. S. 547, and *Southern Power Co.* vs. *North Carolina Public Service Co.*, 263 U. S. 508.

III.

STATEMENT OF THE ISSUES.

The petitioner, under eight specifications of error, raises the following points:

A. Petitioner contends that the Circuit Court of Appeals erred in not sustaining his objections to the charge of the trial court submitting the defense of privilege under the Texas statute (Art. 5432) providing that a "reasonable and fair comment or criticism of * * * matters of public concern published for general information" shall be "deemed privileged and shall not be made the basis of any action for libel"; although the trial court submitted the defense in accordance with the State statute and State decisions with reference thereto.

B. Petitioner contends that the Circuit Court of Appeals erred in holding the evidence sufficient to sustain the defense of truth as found by the jury; although the substance

of every statement in the magazine article complained of was admitted to be true by Petitioner in his testimony on the trial of the case.

C. Petitioner contends that the Circuit Court of Appeals erred in sustaining the ruling of the trial court permitting respondent to read in evidence the deposition of James E. Crawford, taken in a suit between Petitioner and Respondent on substantially the same charge of libel brought in a district court of Kansas in 1930 and dismissed in 1934; such deposition having been admitted in accordance with Rule 26 (d) (4) of the Federal Rules of Civil Procedure specifically authorizing the use of the same.

D. Petitioner contends that the Circuit Court of Appeals erred in sustaining the ruling of the trial court excluding the testimony of 15 patients with reference to operations and medical treatments received by them and the results of such operations and treatments; although petitioner had testified as to the character of the operations and medical treatments and the results obtained and had been permitted the use of four expert witnesses on the same matter.

IV.

ARGUMENT AND AUTHORITIES.

A.

THE TRIAL COURT'S CHARGE CORRECTLY SUBMITTED THE DEFENSE OF PRIVILEGE UNDER TEXAS LAW.

Under his first, second, third, seventh and eighth grounds of error, petitioner complains of the action of the Circuit Court of Appeals in sustaining as correct the trial court's charge with reference to the defense of privilege under the Texas libel statute. The complaint under some of the specifications is that the Circuit Court of Appeals

erred in holding the alleged libelous statements to be privileged. The Circuit Court of Appeals made no such holding, but merely sustained the jury verdict and the correctness of the charge to the jury which contained instructions to the jury with reference to the defense of privilege.

The charge of the trial court is set out in the record on pages 1091 to 1113, inclusive. It instructs the jury with reference to the Texas statute (Article 5432, Revised Statutes) as applicable to the various states of fact which might be found by the jury from the evidence. To show that the charge presented to the jury all of petitioner's theories of liability and the law applicable thereto we quote from the charge the following:

> "Of course, you are the triers here of the facts and it is for you to determine whether upon the facts as you have heard them here this article constitutes a fair and reasonable comment or criticism of Dr. Brinkley and his activities. If you are of the opinion that his activities are of such a character as to render them a matter of public concern and that his conduct is unethical and that his claims are unwarranted then you are entitled to consider the question as to whether the defendant in writing this article has expressed his comment and opinion in such terms as to fairly carry those facts home to the public generally. There is no use blinking the fact that this article was intended to have a wide circulation. It was intended to carry the defendant's viewpoint of Dr. Brinkley's operations to everybody that he could get it to. If his viewpoint is correct, then his purpose and his action are highly laudable. On the other hand, if his viewpoint was incorrect and he proceeded upon a false premise, then his purpose and object was not laudable and he is liable in damages." (R. 1104).

The Court correctly instructed the jury that "matters of public health are matters of public concern," and it was not error for the Court to state "it occurs to me that as a matter of fact, and in discussing the facts with you, anything in a general way which affects the public health is a matter of public concern." (R. 1099). The Court did not charge the jury, as asserted by petitioner, that his (Brinkley's) conduct was, as a matter of law, a matter of public concern. This was left to the jury, and the jury by its general verdict in favor of respondent, resolved the matter on full and adequate evidence in respondent's favor.

Petitioner also contends under the above mentioned grounds of error that the statements contained in the libelous publications are statements of matters of fact as distinguished from matters of comment or criticism covered by the privilege statute. A reading of petitioner's pleadings will show that he complained of language constituting purely "comment and criticism." He framed his pleading so as to declare on only a small part of the magazine article and in the trial centered on the conclusion stated by the author that he was a "charlatan" and a "quack," both of which obviously constitute comment and criticism.

Petitioner also complained especially of the statement contained in the magazine article that the government should do something about his activities in connection with the use of the mails. This, again, is obviously a "comment and criticism" by the author on the admitted use of the mails by Brinkley in sending out thousands of copies of printed pamphlets containing lurid and fantastic claims of his ability to cure maladies, some of which he admitted were incurable. (See summary of these claims and references to the Record, pages 32-42 of Brief for Appellee in the Circuit Court of Appeals).

We submit that petitioner's contentions that error was committed in the portion of the Court's charge to the jury dealing with the statutory privilege accorded to comment and criticism under the Texas law are without merit.

B.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE DEFENSE OF TRUTH OF THE PUBLICATION.

Petitioner complains, under his fifth ground of error, of the statement made in the opinion of the Circuit Court of Appeals that "We are spared the necessity of discussing the assignments of error in detail and of reviewing the evidence. It is sufficient to say that the evidence of plaintiff, who was placed on the stand by defendant, tends to show the truth of the statements of fact complained of and we find no substantial evidence tending to show defendant was actuated by malice or that plaintiff suffered any actual damage compensatable in money." (R. 1167).

The finding of the Circuit Court of Appeals that petitioner Brinkley by his own testimony made admissions tending to show the truth of substantially all the matters of fact contained in the article is absolutely sustained by the record. On cross examination he admitted, in substance, the truth of each statement of fact contained in the entire magazine article. (R. 98-184; 499-534). The above mentioned statement from the opinion of the Circuit Court of Appeals was, of course, made with reference to the sufficiency of the evidence to sustain the jury verdict. This is a question arising on facts, which is not ordinarily reviewed by the Supreme Court.

C.

THE COURT CORRECTLY PERMITTED THE USE OF THE DEPOSITION TAKEN IN A FORMER CASE.

Under his fourth ground of error, petitioner contends that the Circuit Court of Appeals erred in sustaining the ruling of the trial court permitting respondent to read in evidence the deposition of James E. Crawford. This deposition was taken in a suit for libel brought by Brinkley against respondent Fishbein in the District Court of Geary County, Kansas, in 1930 and dismissed without trial in 1934. The Kansas suit was almost identical with the instant suit. It was based on an article written by respondent and published in the Journal of the American Medical Association, entitled "John R. Brinkley—Quack," and had as its central theme the fact that Brinkley was a quack and a man of "unsavory professional antecedents." The pleadings in the Kansas case and the order of dismissal for want of prosecution are set out in full in the record, commencing at page 1014.

The use of the deposition was permitted by the trial court under the provisions of Rule 26 (d) (4) of the Federal Rules of Civil Procedure, the relevant part of which reads as follows:

> "When an action in any court of the United States or of any state has been dismissed and another action involving the *same subject matter* is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor."

The use of a deposition taken in a previous case between the same parties, involving a different cause of action but identical issues, is uniformly permitted by the courts of the several states under statutes similar in their terms to the above quoted provision of Rule 26. See: *Insured Life Fund Co.* vs. *Ward*, 77 P. (2d) 890; *Damm* vs. *Damm*, 266 P. 410; *McCormick and Ray, Texas Law of Evidence*, p. 581; 18 *Corpus Juris*, 750.

Petitioner had full opportunity to, and did, cross examine the witness and read in evidence on the trial of this case a part of this cross examination.

D.

THE CIRCUIT COURT OF APPEALS DID NOT ERR IN SUSTAINING THE RULING OF THE TRIAL COURT EXCLUDING THE TESTIMONY OF PETITIONER'S PATIENTS.

Petitioner offered to prove by fifteen witnesses, drawn from the States of Kentucky, Oklahoma, Kansas, North Carolina, Missouri, North Dakota, Pennsylvania and Texas, that each of them had been operated on and treated by petitioner and that the operation and treatment had produced beneficial results. (R. 402-416). The testimony was excluded on the ground that the witnesses were called to testify to medical facts and to express opinions as to the result of surgical operations, and that, the witnesses being laymen, they were incompetent to testify as to these matters. The testimony was excluded on the further ground that to go into the physical condition of each witness before and after the operation and treatment by Brinkley would result in introducing collateral matters into the case and unduly and unnecessarily prolonging the trial and would open the opportunity to respondent to put on at least an

equal number of dissatisfied patients, which he announced he would seek to do. (R. 401).

Petitioner Brinkley himself testified to the treatment of over 5,000 patients and testified that he was successful in curing practically all of them. (R. 494). He was also permitted by the Court to use four medical experts, who were on the staff of his hospital, who testified, in substance, to the condition of patients who came into the hospital, the operative treatment, and the miraculous results secured. These experts were Dr. Petermeyer (R. 56), Dr. Davis (R. 538), Dr. Conn (R. 550) and Dr. Chandler (R. 557).

Petitioner's attorney stated what he intended to prove by these fifteen patients (R. 402-416) and the substance of what he expected to prove by them was that they had general ill health and distressing symptoms before they went to Brinkley, and that he operated on them and treated them, and that thereafter their health was excellent. This testimony would have been merely cumulative of petitioner's testimony and the testimony of his four experts and obviously would have had a tendency to unduly prolong the trial of the case by introducing a detailed inquiry into the physical condition of each of the fifteen alleged patients. The courts uniformly hold that this type of testimony should not be admitted. *Chamberlayne's Modern Law of Evidence*, Volume 4, Section 3154; *Amoskeag Mfg. Co.* vs. *Head*, 59 N. H. 332; *Yore* vs. *City of Newton*, 80 N. E. 472; *Missouri, Kansas & Texas Ry. Co.* vs. *Bailey*, 115 S. W. 601; *New England Trust Co.* vs. *Farr*, 57 F. (2d) 103.

This character of evidence is also inadmissible in that it involves testimony by a lay witness with respect to a medical fact, which the courts uniformly refuse to permit. *Aetna Life Insurance Co.* vs. *Kelly*, 70 F. (2d) 589; *Scharlach* vs. *Pacific Mutual Life Ins. Co.*, 16 F. (2d) 245; *North*

Texas Traction Co. vs. *Gilbert*, 282 S. W. 850; *Dallas Hotel Co.* vs. *McCue*, 25 S. W. (2d) 902.

CONCLUSION.

This case was tried in the trial court before a jury and was decided against petitioner on issues of fact properly submitted to the jury. We respectfully submit that the District Court and the Circuit Court of Appeals correctly disposed of the case and that the writ of certiorari should be denied.

W. L. MATTHEWS,
San Antonio, Texas,
Counsel for Respondent.

Of Counsel:

LOESCH, SCOFIELD, LOESCH & BURKE,
and CLEMENT L. HARRELL,
10 South LaSalle Street,
Chicago, Illinois.

BROOKS, NAPIER, BROWN & MATTHEWS,
San Antonio, Texas.